

Foreign Exchange Management (Non-debt Instruments) (Fourth Amendment) Rules, 2020

December 8, 2020

On 08.12.2020, the Ministry of Finance notified the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (**NDI Rules**) in the Gazette of India. This is the fourth amendment made to the rules. The key amendments brought about under the NDI Rules, are set out below:

- **FDI in Defence:** Under the amended NDI Rules, 74% foreign direct investment in the defence sector through the automatic route- without approval of the government has been introduced. The increase in the sectoral cap and changes to the conditions for FDI introduced under the NDI Rules, was introduced by the Government of India, prior to the NDI Rules, by way of an announcement in May 2020, and a subsequent Press Note dated 17.09.2020 issued by the Department for Promotion of Industry and Internal Trade, Government of India (DPIIT). The NDI Rules, have now enforced this Press Note, under its auspices.

Under the Press Note:

- FDI up to 74% is permitted under the automatic route in an industry requiring industrial license. Firms seeking new industrial licences will be permitted FDI up to 74 percent under the automatic route.
- FDI beyond 74% is permitted under the government route in an industry requiring industrial license, wherever it was likely to result in access to modern technology or for other reasons to be recorded. This increased limit will be applicable subject to industrial licence under the Industries (Development & Regulation) Act, 1951, and manufacturing of small arms and ammunition under the Arms Act, 1959.
- For infusion of fresh foreign investment up to 49 percent in a company not seeking industrial licence, there should be a mandatory submission of a declaration with the Ministry of Defence in case there is a change in equity or shareholding pattern or transfer of stake by existing investor to the new foreign investor. It should be submitted within 30 days of such change.
- Also it prescribed that foreign investment in the defence sector would be subject to scrutiny on the grounds of national security. Further, the government reserves the right to review any foreign investment in the sector that affects or may affect national security.

In line with Press Note, the NDI Rules have also prescribed certain conditions i.e:

- FDI up to 74% under automatic route shall be permitted for companies seeking new industrial licenses.
 - Infusion of fresh foreign investment up to 49%, in a company not seeking industrial license or which already has Government approval for FDI in Defence, shall submit a declaration with the Ministry of Defence in cases of change in equity/shareholding pattern or transfer of stake by existing investor to new foreign investor, for FDI up to 49%, within a period of thirty days of such change and any proposal for raising FDI beyond 49% from such companies shall require Government approval.
 - License applications will be considered by the Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, in consultation with Ministry of Defence and Ministry of External Affairs.
 - Foreign investment in the sector shall be subject to security clearance by the Ministry of Home Affairs and as per guidelines of the Ministry of Defence.
 - Investee company shall be structured to be self-sufficient in the areas of product design and development and the investee or joint venture company along with the manufacturing facility, shall also have maintenance and life cycle support facility of the product being manufactured in India.
 - Foreign investments in the Defence sector shall be subject to scrutiny on grounds of national security and Government reserves the right to review any foreign investment in the Defence sector that affects or may affect national security.”
- **FDI from multilateral banks/funds (of which India is a member)**

The NDI Rules, have prescribed a clarification to Press Note 3 of 2020 issued by the DIPP on 17.04.2020 aimed to curb “opportunistic takeovers/acquisitions of Indian companies” on account of COVID-19. Press Note 3/2020 had issued restrictions on acquisitions by non resident Indians sharing land borders with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country, then the investment is possible with prior government approval. Under the NDI Rules, amendment has been made to the Rule 6 by inserting a fourth proviso providing that a Multilateral Bank or Fund, of which India is a member, shall not be treated as an entity of a particular country nor shall any country be treated as the beneficial owner of the investments of such Bank or Fund in India.

Please find link to Notification [here](#)